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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY  DEPUTY

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 CHRISTOPHER WEBSTER,

12 Plaintiff,

CASE NO. 08cv0189 BEN (POR)

13 vs.

14 MICHAEL J. ASTRUE,
15 Commissioner of Social Security,

16 Defendant.

**ORDER ADOPTING REPORT AND
RECOMMENDATION**

[Doc. Nos. 14-3, 16, 19]

17 This matter is before the Court upon the Magistrate Judge's Report and Recommendation.
18 (Doc. No. 19.) For the reasons below, the Court **ADOPTS** the Report and Recommendation **WITH**
19 **MODIFICATIONS; GRANTS IN PART and DENIES IN PART** Plaintiff's Motion for Summary
20 Judgment; **GRANTS IN PART AND DENIES IN PART** Defendant's Cross-Motion for Summary
21 Judgment; and **REMANDS** this case pursuant to the fourth sentence of 42 U.S.C. § 405(g).

22 I

23 **BACKGROUND**

24 A. **Procedural History**

25 Plaintiff protectively applied for a period of disability, disability insurance benefits ("DIB"),
26 and Supplemental Security Income ("SSI") on August 30, 2005, alleging that he became disabled on
27 May 20, 2005, because of back, neck, shoulder, and knee problems. (AR 75-83, 123.) The
28 Commissioner of Social Security ("Defendant" or the "Commissioner") denied the applications

1 initially on January 19 and 25, 2006, and upon reconsideration on May 16, 2006. (AR 28-39, 50-55.)
 2 Upon Plaintiff's request, an Administrative Law Judge ("ALJ") held a hearing on February 28, 2007.
 3 (AR 247-62.) The ALJ issued a hearing decision denying Plaintiff's claim on March 24, 2007. (AR
 4 18-27.) The Appeals Council (the "AC") denied Plaintiff's request for review on November 29, 2007.
 5 (AR 4-6.) The ALJ's decision thus became the Commissioner's final decision. *See* 20 C.F.R.
 6 §§ 404.981, 416.1481.

7 Having exhausted his administrative remedies, Plaintiff brought this action on January 30,
 8 2008, under sections 205(g) and 1631(c)(3) of the Social Security Act (the "Act"). 42 U.S.C.
 9 §§ 405(g), 1383(c)(3). He seeks judicial review of the Commissioner's final decision denying his
 10 applications for DIB and SSI under Titles II and XVI of the Act. *Id.* §§ 401-434, 1381-1383f. On
 11 April 27, 2009, Plaintiff filed a Motion for Summary Judgment. (Doc. No. 14.) On May 12, 2009,
 12 the Commissioner filed a Response to Plaintiff's Motion as well as a Cross-Motion for Summary
 13 Judgment. (Doc. Nos. 16, 17.) Plaintiff did not respond to the Commissioner's Cross-Motion for
 14 Summary Judgment.

15 On August 21, 2009, the Honorable Magistrate Judge Louisa S. Porter issued a Report and
 16 Recommendation recommending that the parties' motions for summary judgment be granted in part
 17 and denied in part. (Doc. No. 19.) The parties did not file objections.

18 **B. Findings of the ALJ**

19 The ALJ made the following findings on March 24, 2007:

- 20 1. [Plaintiff] meets the insured status requirements of the [Act] through
 September 30, 2010.
- 21 2. [Plaintiff] has not engaged in substantial[,] gainful activity since May 20, 2005,
 the alleged onset date.
- 22 3. [Plaintiff] has the following severe impairments: chronic low back pain[] and
 chronic knee pain.
- 23 4. [Plaintiff] does not have an impairment or combination of impairments that
 meets or medically equals one of the listed impairments in 20 [C.F.R.] Part
 404, Subpart P, Appendix 1.
- 24 5. After careful consideration of the entire record, the undersigned finds that
 [Plaintiff] has the residual functional capacity to lift or carry 10 pounds
 frequently and 20 pounds occasionally; stand or walk for 2 hours total out of
 an 8-hour workday; and sit for 6 hours total out of an 8-hour workday.

6. [Plaintiff] is unable to perform any past relevant work.
7. [Plaintiff] was born [in October 1964] and was 41 years old, which is defined as a younger individual age 18-44, on the alleged disability onset date.
8. [Plaintiff] has at least a high[-]school education and is able to communicate in English.
9. Transferability of job skills is not material to the determination of disability because applying the Medical-Vocational Rules directly supports a finding of "not disabled," whether or not [Plaintiff] has transferable job skills.
10. Considering [Plaintiff's] age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that [Plaintiff] can perform.
11. [Plaintiff] has not been under a disability, as defined in the [Act], from May 20, 2005 through the date of this decision.

(AR 23-27 (citations omitted).)

III

STANDARD OF REVIEW

The duties of the district court in connection with the Report and Recommendation of a Magistrate Judge are set forth in Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636(b). The district judge must “make a de novo determination of those portions of the report . . . to which objection is made” and “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b). “If neither party contests the [magistrate judge’s] proposed findings of fact, the court may assume their correctness and decide the motion on the applicable law.”

Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge’s conclusions of law are reviewed de novo, regardless of whether any party filed objections thereto. See *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

23 The ALJ's decision denying benefits "will be disturbed only if that decision is not supported
24 by substantial evidence or it is based upon legal error." *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
25 1999). In reviewing the Commissioner's decision, the Court may not substitute its judgment for that
26 of the Commissioner. *Macri v. Chater*, 93 F.3d 540, 543 (9th Cir. 1996). Instead, the Court must
27 determine whether the Commissioner applied the proper legal standards and whether substantial

1 evidence exists in the record to support the Commissioner's findings. *See Lewis v. Astrue*, 498 F.3d
 2 909, 911 (9th Cir. 2007).

3 "Substantial evidence is more than a mere scintilla but less than a preponderance." *Ryan v.*
 4 *Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008). "Substantial evidence" means "such
 5 relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson*
 6 *v. Perales*, 402 U.S. 389, 401 (1971) (*quoting Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229
 7 (1938)). The Court "must consider the entire record as a whole, weighing both the evidence that
 8 supports and the evidence that detracts from the Commissioner's conclusion, and may not affirm
 9 simply by isolating a specific quantum of supporting evidence." *Lingenfelter v. Astrue*, 504 F.3d 1028,
 10 1035 (9th Cir. 2007) (citation and internal quotation marks omitted).

III

ANALYTICAL FRAMEWORK AND BURDEN OF PROOF

13 An individual is considered disabled for purposes of disability benefits if he is unable to engage
 14 in any substantial, gainful activity by reason of any medically determinable physical or mental
 15 impairment that can be expected to result in death or that has lasted or can be expected to last for a
 16 continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A); *see*
 17 *also Barnhart v. Thomas*, 540 U.S. 20, 23 (2003). The impairment or impairments must result from
 18 anatomical, physiological, or psychological abnormalities that are demonstrable by medically accepted
 19 clinical and laboratory diagnostic techniques and must be of such severity that the claimant is not only
 20 unable to do his previous work, but cannot, considering his age, education, and work experience,
 21 engage in any other kind of substantial, gainful work that exists in the national economy. 42 U.S.C.
 22 §§ 423(d)(2)-(3), 1382c(a)(3)(B), (D).

23 The five-step sequential evaluation process for determining whether a claimant is disabled
 24 within the meaning of the Act is as follows:

25 1. Is the claimant presently working in a substantially gainful activity? If so, then
 26 the claimant is "not disabled" within the meaning of the Act and is not entitled
 27 to DIB or SSI. If the claimant is not working in a substantially gainful activity,
 then the claimant's case cannot be resolved at step one and the evaluation
 proceeds to step two.

28 2. Is the claimant's impairment severe? If not, then the claimant is "not disabled"
 and is not entitled to benefits. If the claimant's impairment is severe, then the

1 claimant's case cannot be resolved at step two and the evaluation proceeds to
 2 step three.

3 3. Does the impairment "meet or equal" one of a list of specific impairments
 4 described in the regulations? If so, the claimant is "disabled" and, therefore,
 5 entitled to disability insurance benefits. If the claimant's impairment neither
 meets nor equals one of the impairments listed in the regulations, then the
 claimant's case cannot be resolved at step three and the evaluation proceeds to
 step four.

6 4. Is the claimant able to do any work that he or she has done in the past? If so,
 7 then the claimant is "not disabled" and is not entitled to disability insurance
 8 benefits. If the claimant cannot do any work he or she did in the past, then the
 claimant's case cannot be resolved at step four and the evaluation proceeds to
 the fifth and final step.

9 5. Is the claimant able to do any other work? If not, then the claimant is
 10 "disabled" and therefore entitled to DIB or SSI. If the claimant is able to do
 11 other work, then the Commissioner must establish that there are a significant
 12 number of jobs in the national economy that claimant can do. There are two
 13 ways for the Commissioner to meet the burden of showing that there is other
 14 work in "significant numbers" in the national economy that claimant can do:
 (1) by the testimony of a vocational expert, or (2) by reference to the
 Medical-Vocational Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2. If the
 Commissioner meets this burden, the claimant is "not disabled" and, therefore,
 not entitled to DIB or SSI. If the Commissioner cannot meet this burden, then
 the claimant is "disabled" and, therefore, entitled to disability benefits.

15 *Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999); 20 C.F.R. §§ 404.1520, 416.920.

16 "The burden of proof is on the claimant as to steps one to four. As to step five, the burden
 17 shifts to the Commissioner. If a claimant is found to be 'disabled' or 'not disabled' at any step in the
 18 sequence, there is no need to consider subsequent steps." *Tackett*, 180 F.3d at 1098 (footnote omitted).

19 IV

20 DISCUSSION

21 A. Opinion of State Agency Medical Consultant Dr. Ross

22 On January 19, 2006, Dr. Ross, a state agency medical consultant, assessed Plaintiff's physical
 23 residual functional capacity ("RFC"). (AR 190-97.) Dr. Ross opined that Plaintiff could occasionally
 24 lift and/or carry up to twenty pounds and frequently up to ten pounds. (AR 191.) Plaintiff could stand
 25 and/or walk between two to four hours and sit for about six hours in an eight-hour workday. (AR 191,
 26 196.) Plaintiff could not constantly use his upper extremities to push or pull; his lower extremities
 27 could not do any pushing or pulling. (AR 191.)

1 Plaintiff could occasionally climb ramps and stairs, but never ladders, ropes, or scaffolds. (AR
 2 192.) Although Plaintiff could occasionally balance and stoop, he could never kneel, crouch, or crawl.
 3 (AR 192.)

4 Plaintiff's abilities to handle, finger, and feel were unlimited. His ability to reach, however,
 5 was limited in that he could do no overhead reaching; "all other reaching is ok frequent is ok [sic]." (AR
 6 193, 197.) Plaintiff had no visual or communicative limitations. (AR 193-94.)

7 According to Dr. Ross, Plaintiff was to avoid concentrated exposure to extreme cold and heat,
 8 wetness, humidity, and fumes and odors. (AR 194.) He was to avoid even moderate exposure to
 9 vibration and, therefore, could not work with vibrating tools. (AR 194.) Plaintiff was to avoid all
 10 exposure to heights. (AR 194.) As for Plaintiff's credibility, Dr. Ross found that "overall [Plaintiff
 11 is] not as disabled as [he] portrays to SSA." (AR 197.)

12 Plaintiff contends that the ALJ erroneously ignored the opinion of Dr. Ross. (Doc. No. 14-3
 13 at 10-11.) Specifically, Plaintiff asserts that the ALJ did not include any of Dr. Ross' non-exertional
 14 limitations in his RFC assessment or explain what weight, if any, he gave Dr. Ross' opinion. (Doc.
 15 No. 14-3 at 10.)

16 "[I]n interpreting the evidence and developing the record, the ALJ does not need to discuss
 17 every piece of evidence," only that which is significant and probative. *Howard ex rel. Wolff v.*
 18 *Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003) (internal quotation marks omitted); *see also Vincent*
 19 *ex rel. Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (per curiam). However, although
 20 ALJs and the AC "are not bound by findings made by State agency or other program physicians and
 21 psychologists, . . . they may not ignore these opinions and must explain the weight given to the
 22 opinions in their decisions." Social Security Ruling ("SSR") 96-6p, 1996 WL 374180, at *2;¹ *see also*
 23 20 C.F.R. §§ 404.1527(f), 416.927(f). Moreover, as noted above, the Court "must consider the entire

24
 25 ¹ SSRs are final opinions and orders and statements of policy and interpretations that have been
 26 adopted by the Commissioner. *See Gatliff v. Comm'r of Soc. Sec. Admin.*, 172 F.3d 690, 692 n.2 (9th
 27 Cir. 1999). Once published, these rulings are binding precedent upon ALJs. *See id.*; *see also Bray v.*
 28 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009).

1 record as a whole, weighing both the evidence that supports and the evidence that detracts from the
 2 Commissioner's conclusion." *Lingenfelter*, 504 F.3d at 1035 (internal quotation marks omitted).

3 The ALJ gave little weight to the opinions of Dr. Kater, Plaintiff's treating physician, and
 4 Anthony Woods, D.C., Plaintiff's treating chiropractor. (AR 26.) Further, the ALJ gave more weight
 5 to the opinion of Dr. Sainten, a consulting internist, because it "is substantiated by his clinical findings
 6 and the other objective evidence of record." (AR 26.) As the Report and Recommendation points out,
 7 however, the ALJ neither considered the opinion evidence of Dr. Ross nor explained in his decision
 8 the weight afforded that opinion. The Court, therefore, concurs with the Report and
 9 Recommendation's conclusion that the ALJ committed legal error by failing to do so. Accordingly,
 10 with regard to this issue, the Court **ADOPTS** the Report and Recommendation, **GRANTS** Plaintiff's
 11 motion for summary judgment, and **DENIES** Defendant's cross-motion for summary judgment. The
 12 Court **REMANDS** this case to the Commissioner for further proceedings in accordance with the
 13 applicable law. *See* 20 C.F.R. §§ 404.1527(f), 416.927(f); SSR 96-6p.

14 **B. ALJ's Reliance on Grids**

15 The ALJ found that Plaintiff has the RFC to lift or carry ten pounds frequently and twenty
 16 pounds occasionally; stand or walk for two hours total out of an eight-hour workday; and sit for six
 17 hours total out of an eight hour workday. (AR 24.) Therefore, the ALJ found that, on the basis of
 18 Plaintiff's RFC "for exertional work between sedentary work and light work, considering the
 19 [Plaintiff's] age, education, and work experience, a finding of 'not disabled' is directed by Medical-
 20 Vocational Rules 201.28 and 202.21." (AR 27.)

21 Plaintiff maintains that the ALJ erroneously relied on the Medical-Vocational Guidelines, 20
 22 C.F.R. pt. 404, subpt. P, app. 2 (the "grids"), because Rules 201.28 and 202.21 do not take into
 23 consideration non-exertional limitations that include no pushing and pulling with his lower
 24 extremities; no kneeling, crouching, and crawling; and limited reaching in all directions. (Doc. 14-3
 25 at 11-12.) Plaintiff further asserts that, even though the ALJ may use the grids as a reference point for
 26 decision-making when they do not accurately and completely describe a claimant's RFC, age,
 27 education, or work experience, the ALJ must consider testimony from a vocational expert in order to
 28 rely on the grids. (*Id.* at 12.)

1 As the Ninth Circuit has explained,

2 [t]he grids are applied at the fifth step of the analysis under 20 C.F.R. [§§] 404.1520
 3 [and 416.920], and present, in table form, a short-hand method for determining the
 4 availability and numbers of suitable jobs for a claimant. The grids categorize jobs by
 5 their physical-exertional requirements, and set forth a table for each category. A
 6 claimant's placement with the appropriate table is determined by applying a matrix of
 7 four factors identified by Congress—a claimant's age, education, previous work
 experience, and physical ability. For each combination of these factors, they direct a
 finding of either "disabled" or "not disabled" based on the number of jobs in the
 national economy in that category of physical-exertional requirements. If a claimant
 is found able to work jobs that exist in significant numbers, the claimant is generally
 considered not disabled.

8 *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114-15 (9th Cir. 2006) (citations omitted). "When the grids
 9 do not match the claimant's qualifications, the ALJ can either (1) use the grids as a framework and
 10 make a determination of what work exists that the claimant can perform, or (2) rely on a vocational
 11 expert when the claimant has significant non-exertional limitations." *Hoopai v. Astrue*, 499 F.3d 1071,
 12 1075 (9th Cir. 2007) (citation omitted). Thus, the grids are inapplicable when a claimant's
 13 non-exertional limitations are sufficiently severe so as to significantly limit the range of work
 14 permitted by the claimant's exertional limitations. *Id.*; see also *Nguyen v. Chater*, 100 F.3d 1462,
 15 1466 n.4 (9th Cir. 1996) (holding that ALJ erroneously relied on grids in case where claimant suffered
 16 from both exertional limitation and environmental restriction such as intolerance of fumes).

17 As noted in the Report and Recommendation, the ALJ disregarded evidence of Plaintiff's non-
 18 exertional limitations as opined by Dr. Ross. The ALJ erred in relying on the grids without first
 19 determining if Plaintiff's non-exertional limitations significantly limit the range of work permitted by
 20 his exertional limitations. Accordingly, with regard to this issue, the Court **ADOPTS** the Report and
 21 Recommendation, **GRANTS** Plaintiff's motion for summary judgment, and **DENIES** Defendant's
 22 cross-motion for summary judgment. The Court **REMANDS** this case to the Commissioner to
 23 determine whether Plaintiff's non-exertional limitations significantly limit the range of work permitted
 24 by his exertional limitations.

25 **C. Plaintiff's Obesity**

26 The ALJ found that Plaintiff's severe impairments include chronic low back pain and chronic
 27 knee pain. (AR 23.) Plaintiff maintains that the ALJ failed to evaluate the effect of Plaintiff's obesity
 28 on his chronic back and knee pain impairments. (Doc. No. 14-3 at 13.) According to Plaintiff, the

1 ALJ was responsible for determining the effect of his obesity on his other impairments and its effect
 2 on his ability to work. (*Id.*)

3 As with any other medical condition, the Commissioner will find that obesity is a “severe”
 4 impairment when, alone or in combination with another medically determinable physical or mental
 5 impairment(s), it significantly limits an individual’s physical or mental ability to do basic work
 6 activities. SSR 02-1p, 2000 WL 628049, at *4. The Commissioner “will not make assumptions about
 7 the severity or functional effects of obesity combined with other impairments. Obesity in combination
 8 with another impairment may or may not increase the severity or functional limitations of the other
 9 impairment.” *Id.* at *6. The Commissioner “will evaluate each case based on the information in the
 10 case record.” *Id.*

11 The Court agrees with the Report and Recommendation that, although the ALJ did not consider
 12 the effect of Plaintiff’s obesity on his severe impairments, Plaintiff did not point “to any evidence of
 13 functional limitations due to obesity which would have impacted the ALJ’s analysis.” *Burch v.*
14 Barnhart, 400 F.3d 676, 683 (9th Cir. 2005). Thus, the ALJ did not commit reversible error by failing
 15 to consider Plaintiff’s obesity. *See id.* at 684 (“[The claimant] has not set forth, and there is no
 16 evidence in the record, of any functional limitations as a result of her obesity that the ALJ failed to
 17 consider.”). Accordingly, with regard to this issue, the Court **ADOPTS** the Report and
 18 Recommendation, **DENIES** Plaintiff’s motion for summary judgment, and **GRANTS** Defendant’s
 19 cross-motion for summary judgment.

20 **D. Plaintiff’s Credibility**

21 After considering the evidence of record, the ALJ found that Plaintiff’s “medically
 22 determinable impairments could reasonably be expected to produce the alleged symptoms, but that
 23 [Plaintiff’s] statements concerning the intensity, persistence and limiting effects of these symptoms
 24 are not entirely credible.” (AR 24.) Plaintiff argues that the ALJ’s findings regarding his credibility
 25 are based on legal error and not supported by substantial evidence. (Doc. No. 14-3 at 13-15.) In this
 26 regard, the Report and Recommendation found that the ALJ provided clear and convincing reasons
 27 for discounting Plaintiff’s credibility by pointing to specific evidence in the record. (Doc. No. 19 at
 28

1 19.) As discussed below, however, some of the reasons stated in the ALJ's decision are not proper,
 2 according to the Ninth Circuit.

3 **1. Legal Standard**

4 In evaluating the credibility of a claimant's testimony regarding subjective pain,
 5 an ALJ must engage in a two-step analysis. "First, the ALJ must determine whether
 6 the claimant has presented objective medical evidence of an underlying impairment
 7 which could reasonably be expected to produce the pain or other symptoms alleged." The
 8 claimant is not required to show that her impairment "could reasonably be
 9 expected to cause the severity of the symptom she has alleged; she need only show that it
 10 could reasonably have caused some degree of the symptom." If the claimant meets the
 11 first test and there is no evidence of malingering, the ALJ can only reject the
 12 claimant's testimony about the severity of the symptoms if she gives "specific, clear
 13 and convincing reasons" for the rejection.

14 *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (citations omitted) (*quoting Lingenfelter*, 504
 15 F.3d at 1036).

16 The ALJ may consider many factors in weighing a claimant's credibility, including
 17 "(1) ordinary techniques of credibility evaluation, such as the claimant's reputation for
 18 lying, prior inconsistent statements concerning the symptoms, and other testimony by
 19 the claimant that appears less than candid; (2) unexplained or inadequately explained
 20 failure to seek treatment or to follow a prescribed course of treatment; and (3) the
 21 claimant's daily activities." If the ALJ's finding is supported by substantial evidence,
 22 the court "may not engage in second-guessing."

23 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (citations omitted); *see also Bray*, 554 F.3d
 24 at 1226-27; 20 C.F.R. §§ 404.1529, 416.929. Other factors include a claimant's work record and
 25 testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms
 26 of which he complains. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

27 **2. Plaintiff's Pain Medication**

28 The ALJ found that Plaintiff "has . . . not been taking the strong codeine or morphine based
 29 analgesics ordinarily prescribed for severe pain. He is either taking no medication or only taking
 30 Advil." (AR 25.) "[E]vidence of 'conservative treatment' is sufficient to discount a claimant's
 31 testimony regarding severity of an impairment." *Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007).
 32 In *Tommasetti*, for example, the ALJ permissibly inferred that the claimant's "pain was not as
 33 all-disabling as he reported in light of the fact that he did not seek an aggressive treatment program
 34 and did not seek an alternative or more-tailored treatment program after he stopped taking an effective
 35 medication due to mild side effects." 533 F.3d at 1039.

1 However, “although a conservative course of treatment can undermine allegations of
 2 debilitating pain, such fact is not a proper basis for rejecting the claimant’s credibility where the
 3 claimant has a good reason for not seeking more aggressive treatment.” *Carmickle v. Comm’r, Soc.*
 4 *Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (holding that claimant’s minimal treatment regime
 5 was not proper basis for finding him not credible; claimant did not take other pain medication besides
 6 Ibuprofen because of adverse side effects); *see also Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007).

7 According to Plaintiff, he is unable to afford pain medication and only able to obtain Ibuprofen
 8 through County Medical Services. (AR 129, 256.) Because the Ninth Circuit has “proscribed the
 9 rejection of a claimant’s complaints for lack of treatment when the record establishes that the claimant
 10 could not afford it,” the ALJ improperly discounted Plaintiff’s testimony on the basis of his treatment
 11 regimen for pain. *Regennitter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1999);
 12 *see also Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996); *cf. Gamble v. Chater*, 68 F.3d 319, 322
 13 (9th Cir. 1995) (“It flies in the face of the patent purposes of the Social Security Act to deny benefits
 14 to someone because he is too poor to obtain medical treatment that may help him.” (*quoting Gordon*
 15 *v. Schweiker*, 725 F.2d 231, 237 (4th Cir. 1984))).

16 **3. Activities of Daily Living**

17 Plaintiff testified that his daily activities include taking care of his cat, cleaning the kitchen,
 18 and a little walking. (AR 256, 260-61.) Taking out the trash exacerbates his pain, however. (AR
 19 261.) Plaintiff walks once a week to play card games two and a half blocks away from his house
 20 before feeling pain in his lower back and legs; he then needs to sit down. (AR 256-57, 258.) Plaintiff
 21 also experiences pain when he sits for prolonged periods of time, requiring him to shift positions every
 22 thirty to forty minutes. (AR 258-59.) Plaintiff walks with a cane because he has difficulty with his
 23 balance. (AR 259.) Plaintiff experiences pain in his left shoulder that prevents him from lifting
 24 objects heavier than ten to fifteen pounds. (AR 260.) Plaintiff also complained of suffering from
 25 migraine headaches, whistling in his ears, and pain on the left side of his neck. (AR 261.)

26 The ALJ found that Plaintiff’s “allegations of significant limitations are not borne out in his
 27 description of his daily activities.” (AR 25.)

28 Although [Plaintiff] has described daily activities which are fairly limited, two factors
 weigh against considering these allegations to be strong evidence in favor of finding

1 [Plaintiff] disabled. First, allegedly limited daily activities cannot be objectively
 2 verified with any reasonable degree of certainty. Secondly, even if [Plaintiff's] daily
 3 activities are truly as limited as alleged, it is difficult to attribute that degree of
 4 limitation to [Plaintiff's] medical condition, as opposed to other reasons, in view of the
 relatively weak medical evidence and other factors discussed in this decision. Overall,
 [Plaintiff's] reported limited daily activities are considered to be outweighed by the
 other factors discussed in this decision.

5 (AR 25.) The ALJ noted that, “[a]s long as [Plaintiff] changes positions frequently, he can play
 6 computer games, as indicated by treating physician Kater.” (AR 25.)

7 “[D]aily activities may be grounds for an adverse credibility finding ‘if a claimant is able to
 8 spend a substantial part of his day engaged in pursuits involving the performance of physical functions
 9 that are transferable to a work setting.’” *Orn*, 495 F.3d at 639 (*quoting Fair v. Bowen*, 885 F.2d 597,
 10 603 (9th Cir. 1989)). However,

11 the mere fact that a plaintiff has carried on certain daily activities, such as grocery
 12 shopping, driving a car, or limited walking for exercise, does not in any way detract
 from her credibility as to her overall disability. One does not need to be “utterly
 13 incapacitated” in order to be disabled.

14 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001). Furthermore, activities such as reading and
 15 watching television “are activities that are so undemanding that they cannot be said to bear a
 16 meaningful relationship to the activities of the workplace.” *Orn*, 495 F.3d at 639.

17 Because “[t]he ALJ must make ‘specific findings relating to [the daily] activities’ and their
 18 transferability to conclude that a claimant’s daily activities warrant an adverse credibility
 19 determination,” the ALJ erred in failing to do so in this case. *Id.* (alteration in original) (*quoting*
 20 *Burch*, 400 F.3d at 681); *see also Gonzalez v. Sullivan*, 914 F.2d 1197, 1201 (9th Cir. 1990) (holding
 21 that daily activities may not be relied upon to support adverse credibility determination unless ALJ
 22 makes explicit finding to the effect that plaintiff’s ability to perform those activities translated into
 23 ability to perform appropriate work activities on ongoing and daily basis).

24 **4. Harmless Error**

25 Despite the foregoing, the fact that some of the reasons for discrediting a claimant’s testimony
 26 should properly be discounted does not render the ALJ’s credibility determination invalid, as long as
 27 that determination is supported by substantial evidence in the record overall. *See Tonapetyan v.*
Halter, 242 F.3d 1144, 1148 (9th Cir. 2001); *see also Carmickle*, 533 F.3d at 1162 (“Because we

1 conclude that two of the ALJ's reasons supporting his adverse credibility finding are invalid, we must
 2 determine whether the ALJ's reliance on such reasons was harmless error."); *Batson v. Comm'r of Soc.*
 3 *Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (concluding that, even if record did not support one
 4 of ALJ's stated reasons for disbelieving claimant's testimony, error was harmless).

5 Here, although the ALJ improperly relied upon Plaintiff's lack of pain treatment and his
 6 activities of daily living to discount his credibility, the ALJ's error was harmless because substantial
 7 evidence otherwise supports the ALJ's credibility determination. For example, the ALJ noted that
 8 Plaintiff's doctors "reported near normal physical examination on multiple occasions with only
 9 abnormal findings of moderate tenderness; some restricted range of motion of the lumbar spine; slight
 10 limitation in abduction of the right shoulder. He [has] no neurological deficit." (AR 24 (citation
 11 omitted).) The ALJ further noted normal X-rays of Plaintiff's knees and spine. (AR 25.)
 12 Furthermore, the ALJ noted that, despite Plaintiff's allegations of "disabling fatigue and weakness,
 13 he does not exhibit significant atrophy, loss of strength, or difficulty moving that [is] indicative of
 14 severe and disabling pain." (AR 25.) The ALJ, therefore, properly considered the objective medical
 15 findings in discounting Plaintiff's testimony. *See Burch*, 400 F.3d at 681 ("Although lack of medical
 16 evidence cannot form the sole basis for discounting pain testimony, it is a factor that the ALJ can
 17 consider in his credibility analysis."); *Connett v. Barnhart*, 340 F.3d 871, 873-74 (9th Cir. 2003)
 18 (holding that substantial evidence supported ALJ's decision to deny claimant's claim with respect to
 19 back, shoulder, and neck pain because, *inter alia*, X-rays, CT scans, and myelograms were normal);
 20 *Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (claimant who did not show muscle atrophy or
 21 other physical signs of totally disabled person not fully credible). Moreover, the ALJ properly
 22 considered Plaintiff's work activity after his alleged onset date of disability, although it did not rise
 23 to the level of substantial, gainful activity. (AR 24, 255-56.) *See Bray*, 554 F.3d at 1227 (considering
 24 recent work activity as relevant to credibility); *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993)
 25 (determining that substantial evidence supported ALJ's finding, *inter alia*, that claimant's ability to
 26 attend school three days a week was "an activity which is inconsistent with an alleged inability to
 27 perform all work"). *But see Lingenfelter*, 504 F.3d at 1038-39 ("It does not follow from the fact that
 28 a claimant tried to work for a short period of time and, because of his impairments, failed, that he did

1 not then experience pain and limitations severe enough to preclude him from *maintaining* substantial
2 gainful employment. . . . [I]t is at least as likely that the claimant tried to work in spite of his
3 symptoms, not because they were less severe than alleged.”). Accordingly, with regard to this issue,
4 the Court **ADOPTS** the Report and Recommendation **AS MODIFIED**, **DENIES** Plaintiff’s motion
5 for summary judgment, and **GRANTS** Defendant’s cross-motion for summary judgment.

6 V

7 **CONCLUSION**

8 For the foregoing reasons, the Court **ADOPTS** the Report and Recommendation of the
9 Magistrate Judge **AS MODIFIED** herein; **GRANTS IN PART AND DENIES IN PART** Plaintiff’s
10 Motion for Summary Judgment; **GRANTS IN PART AND DENIES IN PART** Defendant’s Cross-
11 Motion for Summary Judgment; and **REMANDS** the case for further proceedings under the fourth
12 sentence of 42 U.S.C. § 405(g).

13 **IT IS SO ORDERED.**

14
15 DATED: 9/16/09


Hon. Roger T. Benitez
United States District Judge

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